

Congress of the United States
Washington, DC 20515

July 20, 2016

The Honorable Jacob Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Lew:

We are writing to request information regarding the need for increased regulation of the commercial bail insurance industry. Despite its size, no federal agency has ever investigated or issued regulatory guidance to the commercial bail industry. This lack of federal oversight has allowed the industry to engage in predatory behavior. Therefore, we urge the U.S. Department of Treasury to investigate the commercial bail industry and the insurance companies that back them.

Large insurance companies like AIA, Universal Fire and Casualty Insurance Company, Lexington National Insurance Corporation, and Black Diamond Insurance Company, have spent millions of dollars a year backing the commercial bail industry. The Federal Insurance Office, created under the Dodd-Frank Act and housed within the Department of Treasury, has authority to review non-health insurance products such as bail insurance.

Unlike other forms of insurance, bail insurance affects consumers who do not purchase their product. While an auto insurer agrees to pay the policyholder or another injured party upon the filing of a claim, the commitment made by commercial bail insurers are not made to consumers, but to the state, and by extension, the community at-large. Bail insurance ensures the defendant will appear in court, and bondsmen will physically apprehend the defendant if they do not appear. As the public is the beneficiary of these services, the public should have access to information regarding how, and to what effect, the bail insurance industry conducts its business.

When a defendant is released on secured financial conditions, courts often set bail so high that defendants cannot pay it without the help of commercial bail bondsmen.¹ Defendants

¹ According to data released in December 2013 by the Bureau of Justice Statistics, pretrial release on a commercial surety bond was the most common method of pretrial release, accounting for four in five financial releases and roughly

who cannot pay their bail have two options: take out a bail bond, or remain behind bars. This makes commercial bail insurance a uniquely coercive product. If a defendant chooses not to purchase a bail bond, the price is their freedom. This alone is reason enough for the commercial bail industry to receive significant public scrutiny.

In the past several years, many consumers and other criminal justice stakeholders have worked to reduce or eliminate the use of money bail, and commercial surety bonds in particular.² This work is based on a combination of factors, including recent developments in the law³ as well as important findings from social science research.⁴ The research provides numerous reasons to avoid commercial surety bonds as they tend to increase unnecessary pretrial detention,⁵ disrupt defendants' lives (with a disproportionate impact on low-income people and people of color),⁶ and increase the risk of new crimes against the public.⁷ In fact, the United States is one of two countries in the world with a dominant commercial bail bonds industry.⁸ In many nations, such a system would be considered an obstruction of justice.

Moreover, the money bail and commercial surety bond systems have played a role in the mass incarceration crisis. Since 2000, the increased detention of pretrial defendants has

half of all releases. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, at 15 (BJS 2013), found at <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

² The reduction or elimination of money at bail is part of a larger pretrial justice movement concerning a grand overhaul of pretrial release and detention processes that bail insurance companies have largely opposed. See Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC 2014), found at http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8_2014.pdf; *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (PJI/MacArthur Found. 2012), found at <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>; Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (JPI 2012), found at http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

³ See Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015) (arguing that bail practices that result in incarceration based on poverty violate the Fourteenth Amendment of the U.S. Constitution), found at <https://www.justice.gov/file/340461/download>; *Walker v. Calhoun*, No. 4:15-CV-0170-HLM (N.D. Ga., Jan. 28, 2016) (order granting injunctive relief) at 48 (“Certainly, keeping individuals in jail solely because they cannot pay for their release, whether fines, fees, or a cash bond, is impermissible.”).

⁴ See, e.g., Anne Milgram, Alex Holsinger, Marie VanNostrand, & Matt Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*. Federal Sentencing Reporter Vol. 27, No. 4/216; Pretrial Justice Institute (2015); Marie VanNostrand, Kenneth Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA, 2011), found at [http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20\(2011\).pdf](http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20(2011).pdf).

⁵ Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013), <http://www.pretrial.org/download/research/Unsecured+Bonds.+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>.

⁶ See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (explaining the negative effects on defendants due to pretrial detention); *Barker v. Wingo*, 407 U.S. 514, 520 (1972) (same); Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. Legis. & Pub. Pol’y 919, 921 (2013) (discussing “the widespread and well-documented racial disparities in the bail determination process”), found at <http://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf>.

⁷ See, e.g., Lowenkamp, C.T., VanNostrand, M., & Holsinger, A. (2013). *The Hidden Costs of Pretrial Detention* (LJAF), found at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

⁸ Liptak, Adam (2008). *Illegal Globally, Bail for Profit Remains in U.S.* (New York Times) found at http://www.nytimes.com/2008/01/29/us/29bail.html?_r=0

accounted for ninety-five percent of the overall increase in jail populations.⁹ This growth reflects a change in the way America treats accused, unconvicted individuals. They are charged more money for release, funneled into the hands of for-profit bail bondsmen, and jailed for weeks, months, or years before trial because they cannot afford to pay.

To fight bail reform and to continue to profit off of low-income Americans and people in crisis, the bail insurance companies have periodically resorted to unfair and deceptive practices. For example, when bail insurance companies used Bureau of Justice Statistics (BJS) data to make claims to state courts and legislatures concerning the superiority of commercial surety bonds, BJS issued a rare “data advisory” expressing forcefully that use of its data to claim any particular form of release is superior to any other would be “misleading.”¹⁰ The companies complained directly to BJS, but despite that meeting, in which BJS explained its reasoning personally to the company lobbyist, the companies have continued to make misleading claims.¹¹

Despite these abuses, bail insurance companies have been shielded from any meaningful regulation. Most state insurance regulatory bodies are concerned more with the conduct of traditional insurance providers or, in the case of bail, with discreet instances of misconduct by bail bondsmen. The states appear to be largely unprepared to deal with industry-wide deception that is filtered through the relatively complex layers inherent in the bail system.


Accordingly, we ask that you undertake an investigation of the issues raised by our letter, with the specific goal of determining whether current regulatory processes, including your ability to enforce other federal consumer laws and to gather information to share with state regulatory and enforcement agencies, are adequate to assure consumer protection in the bail insurance industry. We look forward to working with you to regulate the commercial bail industry and protect vulnerable Americans from exploitation.

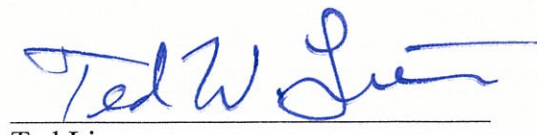
Sincerely,

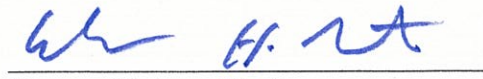
⁹ Minton, T.D. , Zhen, Z., PhD (2015). *Jail Inmates at Midyear 2014* (Department of Justice Bureau of Justice Statistics), found at <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

¹⁰ See Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010), found at http://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf; see also Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012) (explaining the need for the advisory), found at [http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20\(November%202012\).pdf](http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf).

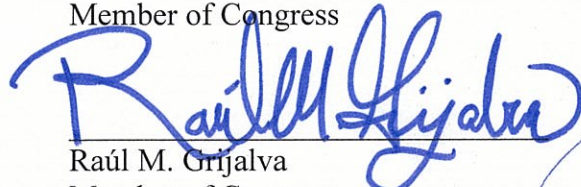
¹¹ The bail insurance lobby reported complaining to BJS in its October 2010 newsletter, found at http://www.asc-usi.com/userfiles/BailResources/ABC_Newsletter%20V1.pdf. The most recent violation of the data advisory came in April 2016, in an interview with the American Bar Association Journal. See Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, ABA Journal Online, found at http://www.abajournal.com/magazine/article/courts_are_rethinking_bail.



Keith Ellison
Member of Congress

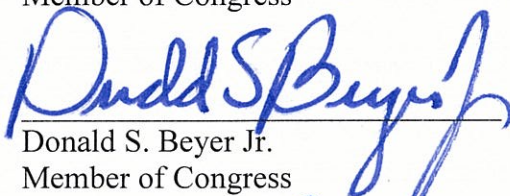

Ted Lieu
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Eleanor Holmes Norton
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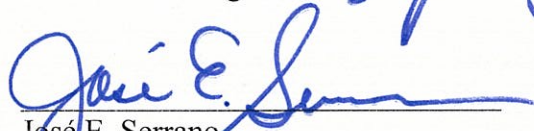

Henry C. "Hank" Johnson Jr.
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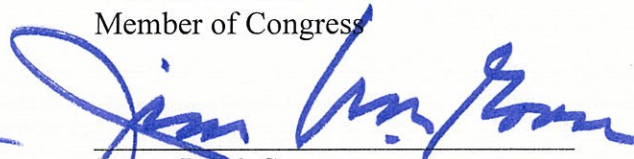

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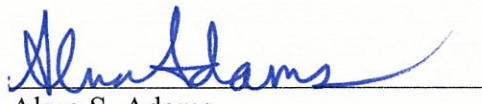

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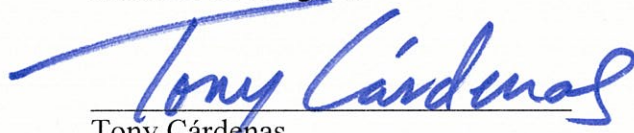

Michael M. Honda
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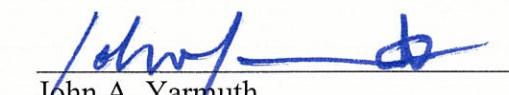

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James P. McGovern
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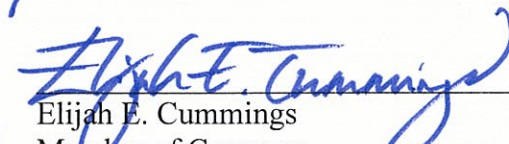

Mark Pocan
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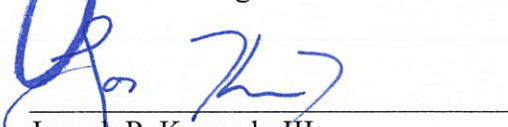

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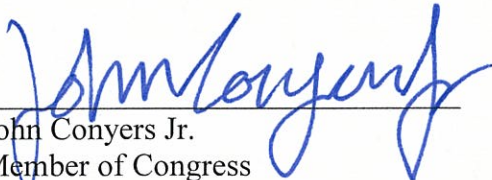

John A. Yarmuth
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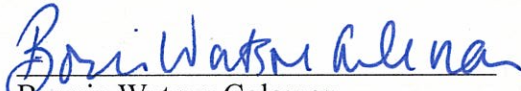

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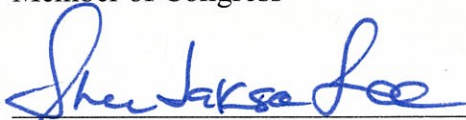

John Conyers Jr.
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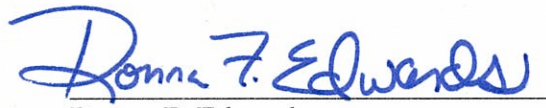

Mark Takano
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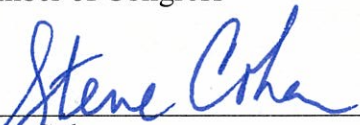

Bonnie Watson Coleman
Member of Congress

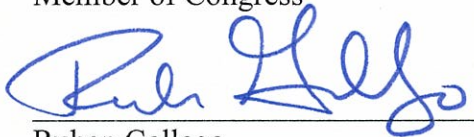

Terri A. Sewell
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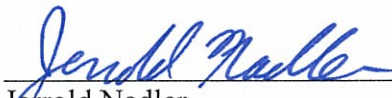

David N. Cicilline
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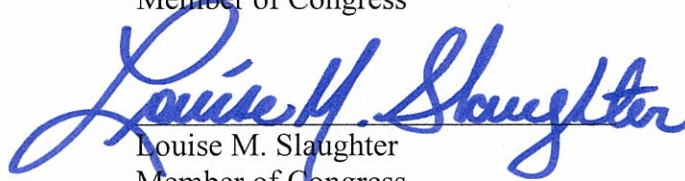

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Donna F. Edwards
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Steve Cohen
Member of Congress


Ruben Gallego
Member of Congress


Jerrold Nadler
Member of Congress


Louise M. Slaughter
Member of Congress


Hakeem S. Jeffries
Member of Congress

cc: The Honorable Attorney General Loretta Lynch, U.S. Department of Justice
The Honorable Director Richard Cordray, Consumer Financial Protection Bureau